From Iudicum Dei to Combat d'honneur

Morphology of Trial by Combat in the Middle Ages

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My interests, both by vocation and avocation, center on chivalric culture[1] of the Middle Ages and early Renaissance. As part of this interest, I am presently engaged in study on surviving medieval fighting treatises—sometimes called *fechtbücher*, literally "fight-books,"—which have come down to us mainly from the German states and Italy, although there are a few outlying examples from Burgundy, England and Iberia. The existence of these treatises[2] is potentially an exciting development to students of medieval warfare or chivalric culture, because they stand poised to turn conventional wisdom about the "rough and untutored" nature of medieval combat on its head.[3] Indeed, I intend to establish that the medieval fighting arts, as preserved within the fighting treatises, represent sophisticated and highly efficient, rational martial arts systems on par with anything found in Asia or around the globe and that the

[1] Perhaps the first challenge made to this paper sought to query my definition of the word, "chivalry," and "chivalric." It is a good question. In general, I would refer the reader to the redoubtable Dr. Maurice Keen, whose 1984 book *Chivalry* attempted to explore the sometimes amorphous term in an effort to resurrect its usefulness. Here, and in the majority of my writing, I use the term "chivalric" as pertaining to knights and the ideals and practices which surrounded them. The word "chivalry" I use either to refer to the knights as a body, (i.e., "the chivalry") or to the ideals which were interwoven with knights, squires, and sometimes to men-at-arms who were similarly governed by the customs and laws of war. The ideals extend also to the court and to the ladies, whose influence enriched the warrior virtues of prowess, courage and loyalty. For an older treatment, see Sydney Painter's *French Chivalry*, which I think still retains some currency and which is an excellent starting point.

[2] There is a tendency for casual examiners of the fight-books to refer to them as manuals. This is a potential problem, because while many of the drill-manuals of the 17th century may be seen in this light, it is not clear that the medieval treatises are in fact manuals' in the pure sense of the word.

[3] This concept of medieval fighting as "rough and untutored" appears to have been bequeathed to modern scholars from our 19th century predecessors, such as Egerton Castle, who, steeped in Romantic historiography, viewed the self-defense arts as a continual "evolution" from primitive to the civilized and refined fencing arts of the 19th century. In the first chapter of his influential *Schools and Masters of Fence*, he writes "…all the books written on the *imperfect* play of our ancestors [italics added]…in which wrestling and leaping were of more avail than aught else, to the courteous and academic 'assault' of modern days, where elegance and precision of movement are more highly considered…A critical examination of the old treatises shows, however, that in the heyday of the dueling mania, more reliance was evidently placed on agility and 'inspiration' than on settled principles" and "It can be safely asserted that the theory of fencing has reached all but absolute perfection in our days [1898] when the art has become practically useless." A notable academic exception is Dr. Sydney Anglo, whose articles and 2000 *Martial Arts of Renaissance Europe*, has made an excellent preliminary foray into the field, although it strongly emphasizes the Renaissance treatises, rather than the medieval.

existence of these arts suggests much greater sophistication amongst the chivalric classes than has generally been accorded.

Co-central to my study of these fight-books are the vast number of German treatises following the teachings of the 14th century German *fechtmeister*, Johannes Liechtenauer.[4] Active from the middle of the 14th century, the old master recorded his teachings in mnemonic verse known as *zettel*, or *merkeverse*. This verse was to be taught in secret, but of course it was not long before his students—having established themselves later as *fechtmeisters* in their own right—recorded the *zettel* and accompanied the verses with explanatory commentary, known as *glosa*. More than twenty known manuscripts from this tradition are known, in addition to those we know about from Italy, Burgundy, and Iberia.[5]

One of the most colorful and beautiful of these treatises dates from the third quarter of the fifteenth century, by Paulus Kal. Meister Kal was *fechtmeister* to Ludwig IX, Duke of Bavaria, a point established from payment and receipt books as well as from the dedication of his beautiful book, recently published in a facsimile translation as "In Service of the Duke."[6]

Below are the first two leaves of Kal's book, Master Kal himself offering his service to the Duke: "Gentle lord I pledge my service to you, Pray [to] God and his loving mother shall

[4] I am more interested in the works of the late 14th and early 15th century fighting master, Fiore dei Liberi, whose surviving treatises I have been engaged in translating and reconstructing since 1999. Fiore, like his German counterparts and according to his Prologues, sought to provide a system of combat which could be used *a oltranza*, (*à outrance*), which can best be defined, perhaps, by contrasting it with feats of arms conducted *à plaisance*, where injury was not a primary objective of the combat—rather, the goal was to demonstrate prowess and martial virtue with what Fiore would have referred to has something like harmony, *concordia*, similar to the "good sportsmanship" of our own day, contrasted with the "win at all costs" attitude which sometimes prevails. I usually translate *a oltranza* and its French variant as "without limits."

[5] Among those known to have survived to the present day are the works of the priest Hanko Döbringer (1389), Sigmund Ringeck (1440s), Peter von Danzig (1452), Hans Talhoffer (1447, 1459, 1467, plus two others), Johannes Lecküchner (1482), Peter Falkner (~1475), Hans Folz (~1480), Hans Wurm (~1490), Jörg Willhelm, (1522-3,), Paulus Hector Maier (1542), Joachim Meyer (1570), Jakob Sutor (1612). Although some biographical material is available in modern translations, the best treatment must be regarded as Peter Hans-Hils, *Meister Johann Liechtenaeur's Kunst des Langen Schwerts*, Lane, 1985.

[6] Kal, Paulus., *In Service of the Duke: The 15th Century Fighting Treatise of Master Paulus Kal*, Trans. and Commentary by Christian H. Tobler. Chivalry Bookshelf, 2007.

help us."[7] This may well be an act of homage—a personal pledge of bond between a feudal lord and his subject, a two-way contract symbolized by the placing of hands one within the other.

On the second plate, Master Kal presents his armoured lord with a sword, symbolic of the Art of Arms he intends to present in the book. Notably, he does not present the book itself, but the *Art*, an art through which knighthood is revealed and revered. Along the banner, he makes his declaration, "Take this sword, gentle lord, and you will be granted all knighthood by the mother of God and the knightly Saint George." The Art is a gift from heaven, not a creation of man.

The book shows the usual progression of weapon techniques which teach "principles by example." Both the German and Italian sword-masters seem to present their systems through specific techniques, encoding them according to memory techniques common throughout the Middle Ages and into the Renaissance.[8]

As with similar books, Kal's *glosa* on Liechtenauer's verse shows how the system manifests with a variety of different weapons. On these plates we again find the *langenschwert*, this time unarmoured, and the armoured *streitaxst*, or poleaxe, perhaps the favorite weapon of knights for deeds of arms during the 15th century,[9] what I call the "assault weapon" of the day.

As a complete martial system, the book also includes extensive treatments on unarmed combat—*ringen*—and defense against a dagger, both with and without a weapon in the defender's hand. All in all, these books seem to represent efficient, efficient and highly lethal martial systems.

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[7] This and all subsequent translations of Kal's manuscript are from the Tobler edition.

[8] See especially Frances A. Yates, *The Art of Memory*, University of Chicago Press, 1996, and Mary J. Carruthers, *The Book of Memory*, Cambridge University Press, 1992. There is certainly a whole region of study relating to these books and to the medieval use of mnemonics, organization, symbolism, and potentially of memory palaces which I intend to tackle as a component of the dissertation.

[9] See in particular the deeds of Jacques de Laihlain, the 15th century Burgundian champion who travelled around Europe accomplishing feats of arms—emprises à outrance—against knights in Burgundy, Scotland, Spain, and elsewhere. In addition, the sole French source surviving from the period is concerned exclusively with the poleaxe, an anonymous treatise now in the Bibliotheque Nationale de Paris, entitled *Jeu de la Hache*.

But alongside these "usual" elements, common to most fighting treatises of the period, there is something more. In the *fechtbücher* or fight-book of Paulus Kal,[10] there appear several curious plates depicting a man who, situated in a hole in the ground up to his waist, carries in his hand a wooden baton. In front of him is a woman whose long sleeve contains a hard object—a rock, as it turns out—and it is clear in the following plates that she is trying hard to strike the man in the head and potentially, to kill him. Paulus Kal writes:

> Also schickt sich der man in the gruben dem wybe. Er is eingregraben bis an den gurtl und mag geringes darin umb gan und die aine hand ist Ime mit dem Elnbogen gebunden zu der syttn doch dz Er sy wol rurn mag.
>
> Die fraw mus allso geschicht sein das Ir der Ermel an dem hembde ein dinne Elln fur due hand get alls ain segkelin dar in tut sy ainem stam der da hat iij pfund und hat nichts an wann das hemdb und das is zu wissen den bainen mit ainem nesel gebunden.
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> Thus does the man in the ground [go] against the woman. He is buried up to his belt and can walk around a little, and the one hand is bound with the elbow to his side, yet so that he can still move well.
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> The woman must thus be skillful as the sleeve of her shirt extends roughly an ell[11] before the hand forming a sack, which contains a three-pound stone. She has nothing but the shirt on which is bound together between the legs with a tie.[12]

Over the course of a few more plates, the woman first succeeds by striking the man in the head, which bleeds profusely. Then the man succeeds in capturing the sleeve around his baton, drags the woman down, and dispatches her. On fol. 51v, the sequence resolves with the angelic figure of Mary and child over-watching with apparent approval over the scene: on a banner the

[10] This manuscript was first examined and pondered upon by R.L. Pearsall, "Some Observations on Judicial Duels as Practiced in Germany," *Archaeologia* 29, February, 1840. Mr. Pearsall's cursory examination would certainly be considered inadequate today, and it contains many factual errors (for example, he dates the mss. to c. 1400, which is wide of the currently accepted dating of 1450-1460), but it remains the first awakening of interest in this kind of manuscript and so retains some contextual interest.

[11] An *ell* is variously recorded as 27" (Flemish) and 45" (English).

[12] I have changed, very slightly, the translation by Christian Henry Tobler, whose translation of the Paulus Kal treatise was published in a facsimile-translation edition in 2007 as In Service of the Duke: The 15th century fighting treatise of Paulus Kal. The sequence begins on p. 108 of this edition, corresponding to f. 49v of the original mss.

man apparently gives thanks for his victory: *Gelobt sey maria und ir kint und alle die pey in wonhafft sind*, "Praise be to Mary and her child and all those with them in Paradise."

While many married couples might understand the temporary impulse for such an event, its presence in a chivalric manuscript on martial combat, in this case intended for Duke Ludwig, Count Palatine of the Rhine, seems at best unclear.

But there is more. Also included are odd combats with highly impractical oversized shields, shields enlivened with spikes on each end. These combatants are dressed in curiously styled body-suits, and there is apparently evidence (which I have not seen), that these would often have been of leather, greased with pig-fat. One must appreciate the sheer entertainment value such a spectacle would provide at the very least, assuming that combats such as these ever took place. All entertainment value aside, as historians we must ask several questions. First, did things like this actually take place?

They did, according to German civic records (which I have not yet seen in person).[13] If they did exist, why are they included in a book ostensibly on chivalric combat? More importantly, what role in society could such spectacles possibly serve? Did they represent irrational superstitions, entertainments, or were they in some way rational?

I will argue that not only are such violent expressions wholly rational, but that they expressed the interests of peace in the community through complex mechanisms of *fama*—loosely and poorly translated as "fame," and relationships that formed the backbone of medieval society.[14] Pre-modern medieval society, beginning with the Germanic kingdoms, rested upon the

[13] Needless to say, this assertion will need to be fleshed out prior to publication. I have contacted Mr. Matt Galas, an amateur scholar and attorney working with NATO who is familiar with the German material in order to secure pointers to the records he has hinted at.

[14] The whole mechanism of *fama*/reputation/renown is, has, I believe, barely been touched, although a useful beginning has been essayed in the collection of papers by Thelma Fenster and Daniel Lord Smail, *Fama: The Politics of Talk and Reputation in Medieval Europe*, Cornelle University Press, 2003. I have argued in early essays (chiefly in the *Book of the Tournament*) that renown is the "coin of the tourneyer" in medieval tournaments, the real

bedrock of local community where each person was known to another. Kin and associative groups were the primary agents of stability, therefore peace between kin-groups becomes of paramount importance, as recent scholarship by Stephen D. White and Paul Hyams, have shown.[15] Without a central police force, keeping of the peace within the local community gave rise to customary legal procedure, which various princes attempted to codify and standardize, hence the early law-codes we know from the Salic Franks, Lombards, Goths, Burgundians, Visigoths, etc.

But the central European issue, throughout the Middle Ages, Renaissance, and perhaps culminating in the Enlightenment was the established of the modern, centralized state. Of course, the establishment of centralized authority came at the expense of the local estates and of local communities, which lost sovereignty through creeping encroachment of Royal, increasingly bureaucratic authority. Whether this is a good thing or not is not relevant to the current debate, however interesting, but the impact of the centralization, both ecclesiastical and secular, upon the communities was nothing less than transformative.

Building on medieval efforts of the Catholic Church to establish central authority, secular princes, quite naturally and with increasing effectiveness, strove to expand their authority both within their limited realm and amongst their noble peers. As Gerald Strauss[16] and others argue, the rediscovery and adoption of Roman law was either a major tool of Royal forces of secular centralization or a cause thereof; although this "chicken and egg" argument will continue into the future to provide fertile ground for lively academic debate.

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objective of participation. Although I was speaking in these essays on modern tournaments, in subsequent research my belief in this has been strongly extended to various feats of arms in history. Steven Muhlberger has highlighted this in his superb *Deeds of Arms*, Chivalry Bookshelf, 2003. I hope to do more work on this concept in future years.

[15] Stephen D. White, "Pactum Legem Vincit et Amor Justica: The Settlement of Disputes by Compromise in the Eleventh Century." *American Journal of Legal History*, XX (1978), pp. 281ff. In addition, see Paul Hyams' *Rancor and Reconciliation in Medieval England*, Cornelle University Press, 2003.

[16] Strauss, Gerald. *Law, Resistance, and the State: Opposition to Roman Law in Reformation Germany*, Princeton University Press, 1986.

What is indisputable is that the expansion of Roman law, culminating perhaps with Charles V's 1520s edicts standardizing Roman Law within the Holy Roman Empire, drove out earlier, customary procedure across Europe, which until that time had been based on customary, organic solutions by local communities. But these customary remedies—up to and including feudal rights of private war by the nobility and judicial combats—clashed with the rights of higher princes and centralizing forces led by attorneys and the nascent bureaucracies.

In the older, feudal model, the rights of war were encapsulated in the nobility's duty of community defense, compared to the duties of spiritual defense by the clergy and material defense of the community (i.e., production) by the peasantry. Of course rising commercialism which accompanied the rebirth of the Italian city-states and the Hanseatic states re-established a new commercial class which did not fit neatly into the properly medieval model of political theory, nor did minority groups outside the hierarchy, such as Jews. In addition to wars of defense, the nobles also claimed, at first by right of arms but later through reason, the right to private war.[17]

Private war was redress for injury, real or perceived, which served ultimately, as Susumi Yamauchi[18] has elegantly stated, to restore a peaceful balance in the community by achieving a kind of finality. Similarly, as Paul Hyams has recently argued in his superb *Rancor and Reconciliation in Medieval England*, feud and *vendetta* were similar mechanisms which existed throughout society as critically important safety valves in societies where no civil remedy was

[17] This right to private war resisted determined efforts to extinguish it through both canon and civil law. Chief amongst the weapons employed to extinguish it was the canonical idea of i*us bellum*, or just war, which gradually defined a monopoly for war under divine aegis and rested this power solely within the prince. Ultimately, the papacy even sought to restrict all rights of war to itself, but stiff resistance by the princes and the Holy Roman Emperor in particular forestalled any success on this front. Evidence for the resilience of rights of recourse to private war should be sought in the early feudal codes—the *ius feudorum*—perhaps in Glanvill and Obertus de Orto's *Libri Feudorum*.

[18] Yamauchi, Susumu. "An agreement supersedes the law and amicable settlement in a court judgment: Disputes and Litigation in Medieval Europe." *Center for New European Research Discussion Paper Series #4*, 21st Century COE Programme, Hitotsubashi University, Oct. 2005.

available. In all cases, the mechanisms served to restore balance in the community, albeit through violent methods many today find abhorrent and irrational. But in the Middle Ages violence and death were the bedfellows of life, much as death and its accompanying violence remain an integral part of rural life, even today. In our urbanized, technology-centric society we tend to forget this, leaping to judgment about "primitive" people that came before, but as historians I believe we must resist the temptation to employ modern lenses when judging societies in the past. This makes study of the Middle Ages particularly difficult for "modern" students, but I think many of us here find the challenge both exhilarating and worthwhile.

Fama / Renown

A critically important aspect of medieval society is the central role of the individual's "good name," *fama*, in legal terms, or, amongst members of the chivalric class, *renown*.[19]

I posit that chivalric society in the Middle Ages, and as re-imagined or rekindled in the various ages which have followed, rested on the bedrock of *personal reputation*, what medieval writers of romance and chronicle, such as Wolfram von Eshenbach and Froissart, termed *renown* or *nom*, (*ere*, in the German).

Renown is the *fama*, "fame," which attached to a gentle's name according to the virtue of his action. It is the fame or value which attached to a gentle's name according to the virtue of his

[19] That renown and *fama* are co-equal concepts may be shown by Olivier de la Marche's late 15th century *Traicté du duel Judiciare*. I'm taking my interpretations from Bernard Prost's able 1870 edition, which compares the surviving works in the modern manner. In a footnote on p. 3, there are variant uses both of *renommé* and *femma* (According to Fenster & Smail 'a not infrequent spelling of femme (woman) was, precisely, fame' in French) which Prost believes may have been used for *fama*, and his argument is persuasive given the context. De la Marche's body of work is very interesting. He was master of ceremonies, *Maitre de la Maison*, for the Duke of Burgundy, and he wrote several important works recording deeds of arms and aspects of the chivalric culture surrounding the Burgundian court at a time when the court enjoyed it's greatest period of prominence. In the *Traicte du duel Judiciare*, he wrote for Phillip, the Archduke of Austria, son of the emperor Maximilian I, Duke of Burgundy in 1493. As a first-hand observer of chivalric combats surrounding the courts, he wrote with apparent accuracy and recorded many details of combats, particularly of perhaps the region's most famous combatant, the renowned Jacques de Laihlain.

action. Recently this topic has gained currency and has increasingly been seen as in important component of medieval society:[20]

> Regarding a person, therefore, *fama* is the public talk that continually adjusts honor and assigns rank or standing as the individual grows up, engages in such publically performed acts as marriage, takes up offices or other public duties, wins or loses legal or physical contests, and begins to decline. *Fama*, in this case, can be political, for it serves to define and rank competitors for public honors and functions.[21]

Of course the inverse is also operational, negative renown or "shame," "infamy" can apply equally when one acts, in the community's judgment, in opposition to virtue.[22] Taken to an extreme, a knight can be "craven" if he reduces the value of his name to zero, losing all social status and finding himself outcast, driven from society by the loss of name. Another word for this, used with much less precision and comprehension by most scholars, is *honor*.

I find two kinds of honor operational during the Middle Ages. External honor is the aforementioned *renown*, and it is won through martial deeds, excellence, and the display of the whole spectrum of knightly virtues, loyalty, prowess, courage, courtesy, generosity (or largesse), purity (honesty), and humility (the counter of pride, or humility's inverse, *vainglory*). These virtues were endemic in chivalric society's understanding of itself, and powerful evidence survives today in the "chivalric" histories of Froissart, the long history of Arthurian and similar romance cycles (starting with the Chanson de Roland), and in knightly handbooks, several of which survive today.

The second kind of honor, less important for our discussion today, is internal, what we might today think of *integrity*. This kind of honor involves the individual's internal perception of

[20] *Fama* as a legal concept has also gained parallel currency. See Laura Ilkins Stern, "Public Fame in the Fifteenth Century," *American Journal of Legal History*, Vol. XLIV, 2000, pp. 198-222.
[21] Fenster & Smail, p. 3-4.
[22] This theme has resonated with many interesting works on shame and humiliation as social concepts during the period. See especially F.R.P. Akehurst, "Good name, reputation, and Notoriety in French Customary Law," in *Fama: The Politics of Talk and Reputation in Medieval Europe*, ed. Fenster & Smail.

virtue and due right. It is found by comparing the individual's internal compass—partially formed by his understanding of virtue by his society—and partially by his own opinion.

Both kinds of honor derive their power from a combination of reason and emotion, serving the critical understanding of place and one's position in society. I was surprised to find that Thelma Fenster and Daniel Lord Smail highlight a similar distinction:

> As for honor, *fama* most closely parallels the kind of honor that could be bestowed only by other people, one that had to be plainly visible…through the performance of acts agreed on as honorable. This honor therefore required witnesses, who carried reports of *fama* to others.
>
> A second conception of honor, applicable to the classical and medieval periods and not entirely out of fashion today, construed it as an internalized system of values that a person held, sometimes in opposition to what others have asked of her. In that sense, one could be honorable without being seen by others as having honor—that is, if the private and public notions did not happen to coincide, there may have been little or no fama about such honor.[23]

In a military context, the external version of honor is known as *renown*, whereas most medieval writers refer to the second as *honor*. Renown is frequently cited in chivalric literature and in chronicle such as Froissart as a positive adjective, *renommé*, *nom* and *bon nom* in French, with *riputazione*, *notorieta*, *famigerato* in Italian, in German *ere* (honor),[24] as in a woman who loses respect loses her *wipliche ere*. In Parzival, Wolfram von Eshenbach uses *nach ritters ere*, "as befits a knight."[25]

Combined, these conceptions of renown and honor served to bind the knights and the noble classes together into a cohesive international "brotherhood," where as the venerable Dr. Maurice Keen of Oxford has shown, ties within this community often transcended local bonds.

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[23] Ibid., p. 4.
[24] According to Fenster & Smail, the German *ere* could also mean "respect" or "reputation."
[25] Ibid., p. 11. This page features a superb etymological exploration for the term *fama*, although it is clear that the term *fama* itself was more common in legal circles than outside, where the vernacular terms above predominated. The use of romance literature as a barometer for social trends is an important—and often overlooked—source in exploring aspects of chivalric culture. Many of the romance texts, like their counterparts in knightly handbooks, are designed to instruct the spectrum of knights and others in the chivalric classes in terms of desired behavior. In a very real sense, they are designed as educational instruments delivered through the medium of entertainment accessible to the knights and other members of chivalric society.

We see this in the customary ransom of nobles in war[26]—rather than be slain, noble and members of the chivalric classes were generally ransomed, an important mechanism that served to limited the scope of violence on the battlefield (in contrast with what we commonly believe to have taken place) and to reinforce the reestablishment of peace in the gentle's "community" following a violent battle.[27]

[26] Indeed, the rules of ransom are plainly articulated in early efforts to codify the *ius militaire* or Law of Arms. See in particular Honoret Bonet's *Tree of Battles* and John of Legnano's *De Bello De represalis et de Duello*.
[27] Of course, this mechanism also served as an important tool of recompense in the pre-state societies. Given the delicacy in raising funds for military endeavors, the granting of ransom and booty provided extremely important methods of paying troops in war.

Renown and Feats of Arms

For a strenuous knight, renown was chiefly earned in combat. According to Geoffry de Charny, the 14th century French knight and captain, who, as counselor to Jean le Bon and his Order of the Star, renown was earned in direct proportion to the risk involved in the encounter. In a tournament, for example, some renown was certainly earned. In a joust, where the risk was higher, more renown was earned, and of course the maxim amount of renown was to be had in the primary focus for the knight's vocation, in war—especially or perhaps exclusively in a *just war*.

> For I maintain that there are no small feats of arms, but only good and great ones; for all deeds of arms merit praise for those who perform well in them. For I maintain that some feats of arms are of greater worth than others. Therefore, I say that he who does more is of greater worth.
>
> We have spoken of those men, and of the men-at-arms who in their own region, perform deeds of arms in the way which seems best to them; indeed, no one should speed except in favorable and honorable terms [*certes nul ne peut parler ne doit fors qu'en bien et en toute honneur*], especially in relation to armed exploits in war, in whatever region, provided that they are performed without reproach…For this reason you should love, value, praise and honor all those who God by his grace has granted several good days on the battlefield, when they win great credit and renown for their exploits; for it is from good battles that great honors arise and are increased, for good fighting men prove themselves in good battles, where they have shown their worth….[28]

Critical to this idea of earning renown in a feat of arms was participation, more than who "won" or who "lost," because much of renown was won in the very act of risk (although more was due to the victor, certainly). This can be seen clearly with the *Combat of the Thirty* a famous deed of arms of 1351 was told and retold many times in the second half of the 14th century, first recorded by Jean le Bel and later in two different accounts by Jehan Froissart. In this combat, two groups of garrisoned men-at-arms agreed to fight at the "Half-Way Oak," in a combat *à*

[28] Charny, Geoffroi de. *The Book of Chivalry of Geoffroi de Charny,* Trans. Richard Keauper and Elspeth Kennedy, University of Pennsylvania Press, 1996, pp. 89-91.

outrance. Steven Muhlberger discusses this feat extensively in his influential 2005 book, *Deeds of Arms*:

> …the evidence we have is sufficient to show us that the fame could be, and was, won in such a manner, and it was a fame that was valued by at least some contemporaries…The man-at-arms fought to survive, to gain wealth, and perhaps, if all went well, to advance in respectability and rank. If he had long-range goals of any sort, they included concern for his renown, his good name, in the eyes of the appropriate audience. That audience was not the vast public who valued peace more than anything else; it was the military class, especially his immediate comrades, jos captain, and potential employers.[29]

Irrespective of the individual deeds done that day, their mere participation in the "simulacra of battle"[30] earned each great renown which at least some were able, in turn, to convert directly into political capital, much as a gambler might cash in his chips at the end of a gaming session. As Steven Muhlberger so eloquently summarized:

> But as long as any participants lived, their deeds at Halfway Oak reflected well on them personally, and even after their deaths, as long as they were remembered, their deeds added to their fame and worth…Among the attested participants are two of the most successful self-made men-at-arms of the first half of the Hundred Years War, Robert Knolles and Hugh Caverley, men of obscure extraction from the warlike English marcher country of Cheshire. Both men began their long and lucrative careers…in 1351 neither of them was anyone in particular. Reading the Battle one might believe that their defeat would be an unmitigated disaster…[and the Combat of the Thirty] might have been the beginning of their ascent, the cornerstone of their reputations….[31]

You can see, I hope, where the idea of professional *fama* accrued to knights when they accomplished various deeds of arms, and this serves to explain the durable appeal of violent engagements throughout the course of the Middle Ages, and even after.

The spectrum suggested by our 14th century knight can be generalized further. On one end of the spectrum, some feats of arms, such as the Round Table or Pas d'Armes, were

[29] Muhlberger, *Deeds of Arms*, p. 111.
[30] I have borrowed this phrase from Juliet Barker.
[31] Muhlberger's *Deeds of Arms*, p. 111.

conducted *à plaisance*, that is to say, they were not intended to injure or kill.[32] Some of these encounters involved jousts, while others were really chivalric theater, punctuated by real or simulated combat, which served to celebrate the knightly virtues and to reinforce the social framework in which knights and their ladies participated.[33]

In between, tournaments between groups of knights enabled them to both practice war and to earn money.[34] William Marshal, the redoubtable marshal for Richard I outlived two kings an became in turn both wealthy and Regent of England, earning renown through his martial prowess, chiefly but not exclusively in the rough tournament circuits of the 12th century,[35] very roughly similar in tone (although not in form) to what we see in the recent film, *Knight's Tale*.

At the far end of the spectrum we find war. No higher renown could be won than in doing one's duty to his lord than in defending him in war. The sources of proof are too numerous to name, but it explains the long lists of battle participants that characterize battle descriptions in Johan Froissart's chronicles.

The direct tie between participation in a feat of arms and the earning of renown or infamy seems to function also within trial by combat. Indeed, trial by combat—or *trial by battle*, as it was sometimes called—may itself seen as existing on this spectrum, close to the "war" pole, perhaps an individual iteration of private war, an institutionalization of the private duel which serves to regulate the fighting impulse and to channel it in order to reduce the level of violence, and perhaps, to reduce the chance of a conflict escalating into a cycle of *vendetta*, which damages the peace and material security of a society.

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[32] That injuries and deaths did occur comprised the risk that made such feats of arms worthy of renown. But there is a qualitative difference in engagements "without limits"—*à outrance*—and those conducted *à plaisance*. From their first appearance on the historical stage tournaments became increasingly regulated and expensive, reducing the overall impact of their innate violence and channeling it into more acceptable modes. See especially Richard Barber & Juliet Barker, *Tournaments*.

[33] See Juliet Barker, *The Tournament in England, 1100-1400*, Boydell & Brewer, 1984.

[34] We see evidence of this use of practice for war in Richard I's famous edict, which required knights to participate in tournaments in order to sharpen their skills.

[35] See George Duby's *William Marshal: Flower of Chivalry*, 1987; Sydney Painter's 1982 *William Marshal, Knight-Errant, Baron, Regent of England*; and most recently, David Crouch, *William Marshal: Knighthood, War & Chivalry, 1147-1219.*

Participation in a trial by combat would also have a direct impact on the defendant's *fama*. If a defendant lost the combat, the result was a "winner take all" total loss of *fama*: they would have lost their *bon nom* and would be, in the future, unable to testify in any future court proceedings in their own name. In fact, recourse to trial by combat is attached to crimes which specifically invoke a kind of bad faith. In the words of Robert Bartlett:

> "Closely allied to treason were charges involving breaches of agreement, especially violation of truces…The appropriateness of the duel for such charges is clear. Charges of treason, breach of truce, or perjury involved not only the imputation of wrong, *but also the implicit accusation of bad faith*. In such circumstances an exculpatory oath was clearly not acceptable, for the charge implied that no trust could be placed in the word of the accused."[36] [Italics added]

Bartlett clearly identifies a key element of trials by combat: given the *infama* implied by a charge of bad faith, testimony was insufficient. The use of a combat, a feat of arms, in order to regain right of standing through the truth of the testimony is, I believe, highly telling.

An illicit and heinous crime, such as poisoning, struck directly at the fama-based bonds of local society by sowing acid distrust. It was imperative, I believe, for local society to push hard against such crimes, erecting stout barriers and stiff penalties for transgression. We see this even at the royal level, where crimes of treason and breach of truce were, in the Law of Arms and increasingly in the formalized Roman law codifications, capital offenses. Thus, we find the extreme penalties for those convicted in trials by combat, the defeated could even be outcast, or subject to severe penalties relating to perjury[37] and for the crime in which they were accused.

The Law of Arms

[36] Bartlett, p. 108.
[37] The penalties for perjury were steep. See the discussion in Neilson, *Trial by Combat*, pp. 14-29.

Of course, trials by combat were not merely forms of a feat of arms. They were court trials that were largely rational responses to the regulation of peace within a medieval society which had no state mechanism for policing.

Chivalric and military society during the Middle Ages was governed by customary law derived from the common, accepted and suitably ancient practice of the knightly classes known as the Law of Arms. This law of arms, unlike the civil or canon law, was resident in the knights as military persons and was kept in the memories of highly renowned and esteemed knights.[38] It was not so much a legal code as a loose collection of "right actions" that took into account both precedent known to the "judges"—renowned knights—and to the "justice" of a question in arms, questions which like the community justice practiced by the rest of society, weighed the renown of the accused and thus the proof established by his testimony.[39]

The Law of Arms thus parallels other customary law, such as canon law—which applied to all clerks—and guild law—which applied to guild members. These were the self-policing mechanisms which medieval society developed in the absence of civil state authority, and they came, as we shall see, under direct assault with the development of the centralized state. [40]

For a long time, trial by combat survived the general decline (in the 13th- 15th century) in military cases. As mentioned above, in accusations of treason and breach of truce, (where the penalty was death), a defense of trial by combat persisted into the 16th century. The English court of chivalry, under the purview of the Marshal and Constable, oversaw such proceedings and the

[38] In this sense it represents a kind of personal law, where the law was resident in the person rather than in the geographical area in which they found themselves, much as canon law applied to ecclesiastics.
[39] See especially Maurice Keen, *The Laws of War in the Late Middle Ages*, Routledge, 1965, and my earlier paper on this subject.
[40] See especially the superb book considering the problem of violence and chivalry in Richard Kaeuper's *Chivalry and Violence in Medieval Europe*, Oxford, 1999, where he too argues that it was the development of the state, aided by technology, which reduced the connection between violence and nobility. It created a near-monopoly on licit violence which, I argue, drove the duel of honor into an illicit role, since the state provided no commensurate mechanism to address problems of losses to renown or honor.

right of trial by combat in such cases was not formally abolished under the English court of chivalry until the 19th century.[41] Use of trial by combat as a defense against treason or for a charge of breach of truce is mentioned in Beaumanoir and in John de Legnano. Not only are such charges capital, illicit and heinous offenses, but they also strike directly at the renown or fama of the accused in a way that charges of simple homicide do not, because through illicit action, the individuals undermine the peace and stability of the society.

* * *

Outside of the noble sphere, parallel mechanisms were at work. We find many examples of civic combats conducted by a rising burgher class in the 14th and throughout the 15th centuries, especially in the low countries, in many of the German states, and throughout Italy.[42] Indeed, such festivals survive today in many Italian towns.[43] Apart from this, *vendetta* and feud, which Arthur discusses in his presentation similar mechanisms practiced not only by the nobility but by men (and women) of all statures in both England and in Japan.

These forms of violence, as Paul Hyams explains, served important extra-legal functions of peace-building by channeling and containing violence in to a recognizable, and thus roughly controllable structure. In most local law codes, traditions were in place which loosely and flexibly governed community members with a kind of *personal* law.

In any legal system, one of the central issues, before justice can be served, is the ascertainment of truth. While Roman law required extensive rules for evidential procedure, encapsulated in the *cognito extraordinaria*, the burden of proof was usually borne by the accuser. Under the customary laws of the Germans, however, the burden of proof lay with the defendant.

[41] See Squibb, G.D., *The High Court of Chivalry: A Study in the Civil Law of England*, Oxford, 1959 reprinted 1997.
[42] For evidence from the low countries, see Evelyne van den Neste, *Tournois, Joutes, Pas d'Armes dans les villes des Flandre a la fin du moyen age* (1300-1486), École des Chartes, 1996. In Italy, see Duccio Balestracci, *La Festa in Armi, Giostre, tornei, e giochi del Medioevo*, Laterza, 2001.
[43] For an extreme version of this manifestation, see the persistent Venetian custom of conducting civic battles over bridges. Robert C. Davis, *The War of the Fists: Popular Culture and Public Violence in late Renaissance Venice*, Oxford, 1994.

It was in the mosaic of German customary law that the roots of trial by combat may be found. This is, I believe, an extension of the idea of *personal law*: the Germanic idea that the law resides in the person, rather than in the state. A man carries his law with him wherever he is, rather than the law arising from a state or territory, the Roman idea. This idea of personal law seems to me to accord well with the idea of *fama* and renown, since both are resident in the individual.

But the ascertainment of truth in testimony is extremely difficult,[44] perhaps even intractable, if today's experience is any guide. For the medieval judge, whether his view was shaped within the religious framework or not, the establishment of proof was made according to the weight of the word. Within German societies, as we have seen, a member of the lay or ecclesiastical nobility's word was worth more—sometimes much more—than a commoner's.[45] An oath, like a brick (or a feather), had tangible weight, and this weighed was made in order to establish truth.

Proof could be had in a number of ways, but there were many cases, even in the face of documents, testimony was sometimes even held to be of a higher value. This could have something to do with distrust of factors beyond the local community or its control (i.e., documents can be forged), or it could be a barometer testifying to the critical importance of *fama* and reputation in local community.

In a local community, personal reputation, *fama* (or renown, in the military community), was pivotal not only in terms of trial,[46] but as a method of valuing and establishment of trust for the formulation of bonds so critical for local community. A man whose testimony was proved false, in addition to punitive penalties (and these could be horrifically severe, such as the loss of

[44] Fischer, George. "The Jury's Rise as a Lie Detector." *Yale Law Review*, Vol. 107, No. 3 (Dec. 1997), pp. 575-713.
[45] See the Salic and Lombard laws, and Bartlett discusses this point also.
[46] Stern, Laura Ilkins, "Public Fame in the 15th Century," *American Journal of Legal History*, Vol. XLIV, 2000, pp. 198-222. See also the introduction to

a hand, or the having his eyes torn out, which I think is evidence for how seriously a name was taken), a perjurer was held to be infamous, *infama*—the inverse of having *fama*, a good name based on virtue, and could no longer testify (if he could see, walk, or anything else). He or she became an outcast or perhaps an exile, cut off from at least the binding community if not from his central kin group, the ultimate "home base" in local, non-technological community. Perjury was no laughing matter.

Conflict and Local Society

But going to court at all was a form of conflict, and for local communities in the Middle Ages, the maintenance and / or return to a state of peace seems to have been the highest objective, and this objective may well have trumped ideal or centralized ideas of "fact." In studies of actual local court proceedings and church records in both France and Germany, a central theme emerges: the overriding priority at "giving everyone something."[47] To avoid an ongoing a destructive feud, a *vendetta*, the vast majority of conflicts seem to have been handled by arbitration, rather than recourse to judgment and law, which by their nature forced a showdown and reduced the changes for maximizing peace in the community, even if the adjudication was considered to be final. One was to be proved right, the other wrong, and in a local community, this result could prove disastrous if the wider violence of a general feud resulted.

But conflicts did occur, and in these conflicts the proof of oaths was not always sufficient to establish guilt in the minds of the local judges. In early German law, the oath was sometimes

[47] Yamauchi, Susumu. "An agreement supersedes the law and amicable settlement in a court judgment: Disputes and Litigation in Medieval Europe." *Center for New European Research Discussion Paper Series #4*, 21st Century COE Programme, Hitotsubashi University, Oct. 2005.

sufficient as proof. The weight of the oath could be increased through "oath-helpers"—compurgators—who swore, importantly, not to the truth of the testimony (they were not witnesses), but rather to the fama / character of the individual making the oath. This idea was particularly popular within canonical courts, and it persisted well into the Renaissance until finally banished under the steady march of Roman law.

But oaths were also sometimes insufficient. In illicit cases where proof was lacking (the classic "he said, she said," or where hidden, heinous crimes may have been committed, as in poisoning), or in cases where the individual had insufficient name to provide proof in his own name (i.e., slaves, the infamous), ordeals by fire, water and cross were appealed to. These were the *Iudicum Dei*, the judgments of God, which strike the mind of our present generation as amazingly superstitious and even barbaric.[48]

Alongside this process grew another possible **defense**, one with an ancient, probably unknowable origin, and this was the *trial by combat* or judicial duel, *iuicum bello*. Bartlett and Lea trace it back to the Germanic tribes, citing all German law codes except the Gothic, and it is also found, perhaps, in the Scandinavian *holmgang*, although in that case there is evidence that it was extra-legal, rather than part of the Scandanavian law codes. It was conspicuously absent from Anglo-Saxon law books. It is clear, however, that prior to the 13th century trial by combat was in use as a defense for a wide variety of offenses, both civil and criminal. In the 13th century Italian Liber *Papiensis*, recourse to battle was allowed for many cases, including treason, arson,

[48] There is an ongoing historiographical debate concerning what, precisely, the ordeals did in the context of legal and wider social mechanisms, with Bartlett staking out a position that links the functions inextricably with spiritualism and clerical practice and Brown taking a more sociological approach. I find both arguments well advanced, and have come to a preliminary conclusion that elements of both are part of the answer. In some cases spiritual beliefs probably did give rise to the practice, especially in the minds of the men and women of the time, who saw the world through religious lenses. But equally, their actions served sociological functions quite apart from how they may have understood them which, over the long term, may have equal importance.

poisoning, theft, fornication, forgery, adultery, and treason.[49] Similar causes are found in other books of the period and in the earlier German law texts.

Those few modern scholars focusing on the judicial duel have argued that one cannot know the origin of the judicial duel. Certainly, at least as far back as Classical society, single combats were known and have been used as a method to reduce the violence and to seek redress.

Indeed, feud and *vendetta* are common to all "warrior" societies, I believe because they address ideas of renown and honor, concepts that generally fall well outside the bounds of formal law. This is particularly true in Roman law, which offered medieval Europe with no real mechanism for the addressing of perceived injuries to honor or reputation. The werguild system, by contrast, did address these cases, and as such, the wider violence afforded by long-lasting feud and vendettas were to a degree reduced or avoided.

Trial by Combat as a Defense

Trial by Combat probably came to central Europe with the German tribes. It was, at base, a **defense** which could be invoked by the accused who offered to prove his testimony "on his body," an expression of personal risk which in itself may have earned credibility, *fama*. Those whose name or stature did not enable them to personal compete could undergo the ordeal, or in some cases, clear their names with an oath. It seems primarily to have been used as a defense in felony cases only, robbery, homicide, and the like, but it also seems to have been very popular as a defense in cases of disputes over land ownership. In charges of treason, as we shall see, it was considered for a long time a primary defense, where it survived long after the imposition of Roman law at least in the Courts of Chivalry. Trial by combat could also be invoked, from time to time, as an **appeal** to a judgment for the above-said crimes.

[49] *Liber Papiensis*, ed. Alfred Boretius, MGH, LL, 4, 1868, pp. 590-1.

On the inverse, threat of such a combat could also be a serious deterrent, a social and legal effect it shared with the ordeal.

We find early expressions within the German law codes of the Lombards and the Burgundians, and there are surviving cases. In the 9th Miracles of Saint Benedict, a dispute in 830 between the Abbot of Saint Denis and the Abbot of Fleury, a Benedictine monastery, occurred over the ownership of serfs. The local courts could not reach a decision, and eventually it was moved to Orleans where, "The masters of law and judges from both sides debated fervently…the parties refused compromise, and in a court held by Genes, Deputy Count, it was suggested that the parties should provide one witness each, and after swearing an oath, they should settle the dispute by battling with shields and clubs." If all else fails, "take it outside." As anyone who has shepherded young boys knows, a fight is best broken up after someone has "won" and someone else has "lost." In so doing, the issue is settled once and for all, but in the vast majority of cases, the actual fight never occurred, there being amble room for "out of court" settlements. Indeed, for the vast majority of cases—except for those involving *lesé majesté* (against the king)—every effort was made to reach a settlement before the actual battle occurred. Sometimes such settlements even took place only moments before the first blow was struck, and in the 15th century, even after one or two blows had been exchanged.[50]

As a component the customary laws of war, we find trial by battle survives even into the 14th century in much of German-influenced Europe. In the *Coutumes de Beauvais* of Phillipe de Beaumanoir, perhaps the most complete surviving record of feudal custom, we find three chapters given over to its discussion, complete with court cases (61-63).

The form of the judicial combat strongly paralleled the duel of champions, and was carried out beyond the authority o the church, quite unlike the ordeal, which required

[50] There are a few cases like this in the *Chronicles of Engeurrand de Monstrelet*.

interpretation of divine judgment.[51] No such interpretation of a combat outcome was required, which spoke to the finality, and thus the peace-restoring nature, of trial by combat. Here is an account of how such a battle was to be undertaken, and while the form evolved slightly, it remained strikingly constant in its essence for hundreds of years, and it is described in a couple of places. First, in Beaumanoir's *Coutumes*:

> "It often happens in secular court that the cases result in a wager of battle or that someone deliberately accuses someone else before the judge of a serious offense: and it is a good thing for us to make a special chapter on the subject which will show which cases can be appealed, and how the appeal should be worded and the danger present in such appeals, and which appeals the lord should not permit, so that those who want to appeal will know how they should behave in wager of battle, and what can happen to them if they lose their appeal [*enshieent du plet*].
>
> "In any case of serious crime there can be an appeal, or a wager of battle, if the accuser makes a formal [*droite*] accusation…The sovereign should investigate , even though the party does not want to submit to an inquest; and if he finds the offense well-known and public knowledge, he can deal with it [*justicar*] according to the offense; for it would be a bad thing if, when my close relative had been killed in the middle of a celebration or in front of a quantity of honest men, I had to go to battle to obtain vengeance; and for this reason in such cases which are open knowledge, one can proceed by means of a statement of denunciation."[52]

This appeal could only be claimed by those with proper standing, and the old, women and clerks were not expected to participate directly—instead, they were to secure a champion. I believe that many of the early masters of arms, Paulus Kal's direct professional forbearers, were perhaps professional defense fighters of exactly this sort,[53] a sort of compurgation in trial by battle for those unable to participate directly. At the very least, we know that early instructors of swordsmanship in Paris and in the German states, as well as in England, were sometimes also

[51] Bartlett has an excellent discussion on this point, pp. 120-6.
[52] Beaumanoir, trans. F.R.P Akehurst, CH 61, p. 627.
[53] While it was illegal in England to "hire," a champion—probably a relic of compurgation, in that the champion was participating in the oath process out of a belief in virtue of his principal rather than fighting for pay—this practice does appear to have been relatively widespread, at least as early as the 12th century. See on this point chapter 1 of Sydney Anglo's *The Martial Arts of Renaissance* Europe, pp. 4-20.

fighting instructors who were employed to give accused defendants "crash courses" with several weeks to prepare for their potentially mortal encounter within the lists.[54]

Once participation had been adjudged to be appropriate by the authorities in question—Beaumanoir's sovereign—every effort was made to insure equality on the field. The encounter was taken with great solemnity, and I found a remarkable consistency through the ages in terms of the forms and, in general, of the weapons employed. Thomas of Glouster's 15th century code for the judicial duel is a very good example, sent as a letter to Richard II. The form of this combat is remarkably similar to those of Beaumanoir.

A day is next set for the battle, "no less than 40 days" from the determination, and a suitable location found. Such a location is, in the Glouster letter, approximately 40 paces by 60 paces, or about 120 feet x 180 feet (which is huge, but very similar to the lists proposed by Rene, King of Anjou in his c. 1480 *Livre de Tournois*). I suspect the size is made to support the presence of a royal patron; most continental sources show a much smaller list, anywhere from approximately 15' x 15' to 60' x 60'.

The weapons chosen seem to vary according to local custom. In the Glouster rules, the court chooses them and assigns them to the combatants. In the Coutumes, commoners may arm themselves as they please and appear on foot, while gentlemen may appear on horseback (unless they face a commoner, in which case they too must appear on foot). It seems that the offensive arms may have been provided by the court, while defensive armour may have been the responsibility of the combatants. In general, the weapons used correspond directly with those used in a chivalric duel, including the long and short swords, spear, poleaxes, and dagger. In England and in some places on the continent, a club or beaked club—in the manner of a short

[54] Ibid, pp. 18-20.

warhammer—seems to have been a long-established custom, clubs also being mentioned directly in Frederick II's 1231 law code of Sicily (discussed in more detail below).

Once the combatants were present on the appointed day, they would again make an oath testifying as to the veracity of their claims. The appellant would array himself near the east end of the lists, while the defendant would be on the West. There was a great deal of prescription concerning the exact form of these oaths, and they are recorded in Beaumanoir:

> *The appellant must first swear on the Holy Gospels, saying, 'so help me God and all the saints, and these holy words,' and he should place his hand on the book, 'I swear that Jehan whom I have appealed against did the thing, or had it done…in the manner I claimed against him and and I will prove this by right…I challenge you as a perjurer...so help me God and all the saints and these Holy words, I swear that I had no fault in the thing which Pierre appealed against me. And what he said against me was a lie and he is a perjurer, and I will prove him such with the help of God and my right.*[55]

Following the invocation, combatants would then engage and fight until one had bested the other, either by driving him out of the lists, killing him, or otherwise forcing him to surrender. There were no rules of conduct once the "oyez, oyez!" had been cried, although appeals to magic other than divine favor were strictly forbidden, as were cries and words of either encouragement or assistance from the spectators. Indeed, the kindred of the combatants were, in John of Legnano's summary, to be led away from the field to forestall any temptation for them to break the rules and intervene. One can image a mortal combat conducted in an eerie, momentous silence.

Increasing Regulation

During the 14th century, massive efforts were being undertaken to codify and "regularize" customary practice, and Beaumanoir's treatise represents an important step along this path. But

[55] *Coutumes* 1839, p. 673.

with these efforts at codification also came a desire by secular and ecclesiastical authority to reign in customary practice.

With the 4th Lateran Council of Innocent III, in 1219, the ordeal was finally banned and quickly went out of common practice throughout much of Europe. Similarly, firing early salvos in the struggle for centralization, the 1231 *Liber Augustalis* of Emperor Frederick II extended trial by combat in all but very limited circumstances:

> With few exceptions, we do not desire that *monomachia*, which is called duel in the vernacular, should ever have a place among the men subject to the authority of our kingdom. For *monomachia* cannot be called so much a true trial as a kind of divination. This is not constant with nature. It deviates from the common law and it does not harmonize with considerations of equity. For hardly or never can two fighters be found who are so equal that either one is not completely stronger than the other, or one does not exceed the other somehow by his greater power and superior strength, or at least by ingenuity.
>
> However, we exclude murderers who are said to have killed someone by poison or some secret means from the generosity of this law.
>
> Nor do we permit them to be tried by trial by combat. Rather, we order than the trial should be tried first by ordinary evidences if there are any remaining, and then, by a subtle investigation made by the office of the court. Finally, if the crime cannot be proved by any evidences or by inquisition, the preceding persons may agree to trial by combat. We desire that all these matters should be explained by the office of the appointed judge, who has jurisdiction, so that he may discuss cautiously and diligently the matters which have been proved in the inquisition. If, as has been said, he should find that the case has not been proved, he should grant the accuser permission to offer combat. Nothing that he did in his office should prejudice the right of the accuser. But if the person who brought the accusation of crime offers earlier to provide evidence by witnesses, the proof by inquisition and trial by combat should have no place at all if the evidence of the witnesses is unconvincing. Even if the defendant is guilty, he is not convicted and is presumed innocent and is absolved. We desire that this should be the common law among all Franks and Lombards in all cases. For We have provided sufficiently for contests of evidence for the knights and nobles of our kingdom and also for others who can offer combat, as has been established more clearly in our new constitution.
>
> We also make an exception for the crime of treason, to which, within the written laws, we reserve trial by combat. It is not remarkable that we subject defendants of treason, murderers by stealth, and poisoners not so much to judgment as to terror by combat. Not that Our serenity considers things just in these matters that it considers unjust in others, but we desire that murderers of this kind should be put in public view of other men under a fearful test as an example

> to others, because they were not at all afraid to prepare secret and hidden snares for the lives of men, whom divine power alone can create. Therefore, we confirm that they are beyond all bounds of moderation, for they do not fear to understand our security, by which the security of others is maintained.[56]

It is clear from the Emperor's text that his clear desire was to eliminate recourse to battle for "knights and nobles," replacing their prerogative with evidentiary procedure. Despite his wishes, it very much appears that trial by combat and recourse to private war continued despite the constitutional effort. Despite his desire that this law would apply to, "all Franks and Lombards," it is precisely in the Frankish and Lombard regions where the best proof for the continued recourse to trial by combat occurs. Emperor Frederick was not successful, but he does appear far-sighted.

A similar step was taken in 1306 by Phillip the Fair, where he tightly restricted trial by combat to very specific cases:

1. The homicide treason or other serious crime which must be notorious and certain.
2. The crime must be capital, not mere larceny.
3. The combat must be the only means of obtaining conviction and punishment.
4. The accused must be notoriously suspected of the deed.[57]

Paraphrased by Neilson in Trial by Battle, "A specific charge was necessary, appellants were to guard against saying ought against villainous the accused, which did not concern the immediate quarrel."[58]

Despite these efforts, recourse to combat persisted. It was pressed from civil cases apart from writs of right and land disputes early in the process, certainly during the 13th century, but it survived and perhaps even thrived as an appeal to charges of treason. By the 14th century, despite

[56] Frederick II's *Liber Augustalis*, Trans. James M. Powell, Title XXXIII (33), pp. 92-3.
[57] Quoted in Neilson's *Trial by Battle*, pp. 160-1.
[58] The whole of Phillip's edict is apparently quoted in full within DuCange, *voce* Duellum, but I have not yet succeeded in obtaining a copy.

more than two hundred years of attempted regulation by princely authority, coupled with strong disapproval by the Church, trial by battle continued.

As I have elsewhere written, during the 14th century the customary laws of war were under assault by the attorney class, both from canon and civil law points of view.[59] The expansion of Roman law theory, blended with canon law which provided the theoretical underpinnings and teological framework, attempted to "rationalize" and "standardize" customary procedure, not only in military custom, but in all areas of law with varying degrees of success. We have potent records of these attempts, recorded in the famous *Tree of Battles* by Honoret Bonet in *De Bello, de Represaliis, et de duello* by John de Legnano and Nicholas Upton's late 15th century treatise, *De Studio Militari*.

Legnano, a 14th century Bolognese lawyer, provides some very clear text "boxing in" or "defining" appropriate duels, supported by powerfully referential legal readings. His work was extremely influential as lawyers throughout Europe sought to remove military custom from the sovereignty of the "renown knights" and lodge it within a professional judicial class. Legnano, in his extremely influential *De Bello, de Represaliis, et de Duello*, discusses the duel extensively in the 6th and final section:

> It remains now to consider the duel, in treating which I shall first ask what a duel is; secondly, how many kinds of duel there are; thirdly, by what law it is allowed; and by what forbidden; fifthly, for what causes a duel is lawful; and sixthly, between whom it is lawful; and seventhly, how it shall be waged….[ch clxviii]
>
> …for there are three kinds of duel. For a duel is either fought for exaggeration of hatred, or to win public glory by strength of the body, or for the compurgation of some accusation brought. [ch clxx]
>
> …It is fought then for exaggeration of hatred, when men are induced by mere hatred, natural in its origin, and that of singular naturalness which natural philosophers call the "specific form," to exterminate one another. And I do not find that this duel is regulated by legal rules; but is springs from natural first principles, as I shall at once show… [ch clxx]

[59] *Summa on the Medieval Laws of War*, Brian R. Price, unpublished paper, summer 2007.

> …It is fought, secondly, to win public glory, as in public spectacles, when two men prove their bodily strength in various ways. I find that this form of duel is regulated by both civil and canon law…(he cites his many sources, including Aquinus).
>
> …It is also fought, thirdly, for compurgation; that is to say, when an accusation is laid on a person, and the party challenging to the proof, either with or without other proofs, offers to prove it by his bodily strength, and a duel is fought, and the person challenged "purges" himself in this way. And this is also regulated by law…and in the Lombard law…[60]

Notice how Legnano intelligently groups the different types of duello into three categories: Informal fights of hatred, feats of arms, and those conducted by a court for purposes of compurgation. Legnano represents the earliest articulation I have found which distinguishes between the types, but even so, as the manuscript continues, he asserts that none of the three really qualify with solid legality:

> …For I said that this [first kind of] duel was forbidden by natural law, in the sense that rational intelligence, and therefore the law of nations; and by natural law in so far as it contains the moral precepts of divine law; and canon law, and civil law. This may be demonstrated more clearly than day, beginning with the divine law. For one of the precepts of the Decalogue is, "thou shall not kill"… [chclxxii]
>
> …It remains to consider what law introduced, and what forbids, a duel fought for the sake of glory of victory at public spectacle. And I ay that this kind of duel was introduced by natural law…an instinct of nature proceeding from sensuality—but that it is forbidden by natural law in the sense of the law of nations and the divine law. It is also forbidden by canon and civil law, with qualifications, however, as I show presently…For the first kind of duel has extermination as its by reason of abiding natural enmity. But the present kind does not necessarily lead to extermination, but to victory…therefore it is less hateful, since men's acts are distinguished according to the ends intended…for even natural friends would fight duels at a spectacle to the end of winning glory...this duel departs from the equity of natural law only because the killing of a man might which is an act tending to the destruction of the universe, upon which equity the prohibition of the new civil law is founded…but the second takes place in a public spectacle for the pleasure and recreation of the people. And this is why games and spectacles are permitted…
>
> [ch clxxiii]
>
> …That this duel [of compurgation] is forbidden by divine law is proved as follows: An act which is a temptation to God is forbidden by divine law. But this

[60] Trans. J.L. Brierly. *De Bello, de Represaliis, et de Duello. Text of the Bologna Manuscript, 1382*. Carnegie Endowment for International Peace, 1917, reprinted W.S. Hein, 1995.

> duel is so…for God is tempted whenever anything against nature, which is not possible except through divine miracle, is asked Him, as it is directly in this duel of compurgation… [ch. clxxiii][61]

In Legnano's eloquent reasoning all forms of the duel—save for those which apparently carry no risk of killing—those perhaps *à plaisance*—are illegal according to well-backed canon and civil laws. As coherent and clear as Legnano's reasoning was, this was an attempt at declaratory policy, a tool for use by the rising state in its effort to gather unto itself a clear monopoly on violence. Giovanni da Legnano wrote in 1382, and there influence can be clearly seen in other legal tracts attempting to codify the customary laws of war, for example, in Honoret Bonet's *Tree of Battles* and Sir Nicholas Upton's 15th century *De Studio Militari*.

Honoret Bonet's *Tree of Battles*, written in vulgar French, enjoyed considerable influence throughout the French-speaking region of north-western Europe and beyond. Indeed, Christine de Pisan wrote of Bonet as her patron, and his influence clearly runs through *The Book of the City of Ladies* and her interpretation of Vegetius, entitled *De la Faites les Armes e de Chivalry*. In his English translation of Bonet, G.W. Coopland includes a concordance between John de Legnano and Bonet (Legnano was but a generation before Bonet, and there is a possibility that the two met in Avignon.[62]

> Now let us return to the other part of my subject in which I spoke of one man appealing another by wager of battle; for this is a very subtle matter, so that clerks and nobles are often in great doubt about it. I wish, so far as I can, to enquire into all the cases in which law allows wager of battle to be given.
>
> But before I name them I wish to show plainly how, according to divine law, the law of nations, the law of decretals, and civil law, to give wager of battle or to receive it for the purpose of combat is a thing reproved, and is condemned by reason. I say, first of all, it is a thing condemned according to divine law, for the Holy Scripture condemns everything by which we tempt God our Lord; but in doing this we tempt Him, for we wish to know if God will help him who is in the right, and certainly to ascertain the will of God by experiment is an unworthy thing, and divine law does not allow it...I say that wager is a thing condemned by

[61] Ibid, pp. 338-41.
[62] Coopland, p.

> law of nations for this law is founded on natural reason which cannot allow that he who is guilty should be absolved and he who is innocent be condemned, as may often happen in wager of battle…and it is still more condemned by civil law, for civil law has instituted trial by law, and judges to decide, and methods of pleading, and forbids that any man should be judge in his own cause, in this case the wager, wishes to witness his own deed and to give proof by his own body…and clearly all this is condemned by civil law….also it is reproved for canon law has commanded obedience to the Holy Father of Rome and his commandments; therefore if the Pope commands expressly that one should never fight in this form it appears plain that canon law reproves the act."[63]

While clearly influenced by Legnano, as we see above, at least in terms of following the same line of argument with respect to Legnano's third type of duel, there are also important distinctions. The first two types of duel are not included, and although the reasoning is similar there is not enough data to determine whether Bonet drew these arguments from Legnano or whether they were in currency within the legal community at the time.

Unlike Legnano, who wrote from the Chair of Law at Bologna, Bonet drew equally from customary practice, but clearly attempted to reign in the process by way of subtle cooption rather than outright declaration. We can see this clearly in the next passage:

> Now, although we have seen that wager of battle is a thing reproved by law, for the reason that worldly custom and usage have ordained the contrary I pray you to allow us to consider the cases in which law allows and suffers such battle to be made. And I tell you that there are few of them, for so far as my reading goes the doctors speak of only two, and these are now in the ancient laws, but in the laws of the Emperor Frederick (Frederick II's laws are here cited)…
>
> But you must know that we have certain laws which are extraordinary, that we call the Lombard laws, and therein are several cases in which trial by battle, followed by combat within the lists, can be given; and for this reason we must consider all the cases found therein.
>
> The first case of wager…if a man accuses another of having designed to kill the king…(treason)
>
> The second case of wager…if the husband accuses his wife of having plotted his death evilly, either secretly or by poison…
>
> The third case of wager…when a man has killed another secretly during a truce…
>
> The fourth case of wager…in the case of any homicide committed secretly…

[63] Honoret Bonet, *Tree of Battles*, Trans. G.W. Coopland, Chapter CXI, p. 195-6.

The fifth case of wager…if a man has the right of succession after the death of one of his relations, and kills him secretly…

The sixth case of wager…if a man has a serf, and the serf is accused of larceny, and the fact cannot be proved, then if the lord wishes to defend this accusation and prove the innocence of the serf by his body, the Lombard law says that he should be heard.

The seventh case of wager…if a man is accused of having committed sin of adultery with a married woman…

The eighth case of wager…if a man accuses a woman of the sin of adultery committed secretly [as opposed to open adultery?]…then the husband, one of his friends or a champion may wish to defend…And it appears that this law speaks more especially of a woman who has never had a husband.

The ninth case of wager…if a man has possessed or held a movable thing, or an immovable, for a space of thirty years, and another accuses him of having obtained it by false pretences…

The tenth case of wager…if two men have a dispute and one of them produces witnesses to prove his claim, and the other produces the same witnesses, and if, after these have given evidence for the first time their evidence is found to vary, and one of the witnesses wishes to offer wager of battle to the other, Lombard law permits battle…

The eleventh case of wager…if a man demands a thousand francs from another, saying that the father of that other, from whom he inherits his goods, owed them to him; and if the son denies this, and the man has no other proof, but wishes to prove it by his body, the law decides that he should be heard.

The twelfth case of wager…if a man accuses another of secretly having set fire to a house of his, or a barn, or a village…

The thirteenth case of wager…if a husband, to gain his wife's dowry, accuses her of adultery…

The fourteenth case of wager…the case of a man who accuses another of having laid hands on his wife villainously, or with the intention of villainy.

The fifteenth case of wager…if a man wishes to accuse another of having falsely perjured himself…

The sixteenth case of wager…if a man claims to have been in possession of a thing and another has dispossessed him of it evilly, then if the latter denies this the law allows battle….[64]

Bonet cites the usual Lombard sources for trial by combat, articulating clearly that by common usage and custom, Lombard law allows for the usual spectrum of trial by combat, despite the efforts put forward by Frederick II.

[64] Ibid., pp. 197-8.

Following Bonet in the early 15th century was Sir Nicholas Upton, whose *De Studio Militari* enjoyed strong influence in England. In chapters 3-5 of Book 2 he offers a legal summary which is based largely but not exclusively on the Legnano's *de bellum, de represaliis, de duello*:

> In this question moved to know what thing it is, the said doctor answers, saying that it is a bodily war between two persons, devised before and between both parties, either for great renown and worship, or for purgation to be made for some crime objected, for by the reason of some hatred or old grudge from before…[65]

Upton follows Bonet also, allowing for local custom, shown in the 5th chapter below. But it will be seen that he goes further, imparting the recourse to duel not generically to "custom," after Bonet, but to "noble men."

> For inasmuch as noble men often times claim the lands and the countries that others keep and hold, therefore many times this battle has been used among them; as an example the King of England has a great title to the realms of France and other countries therein, as to Normandy, Gascony and Guinne…(the text continues making a hollow case for English sovereignty over France during the last gasps of the Hundred Year's War).[66]

All three of these codifying lawyers attempted to place law firmly inside the framework of canon and civil law. First in this effort was the authorization of war within the theological and political framework they envisioned. All three opened with similar arguments, working within a growing concurrence about the nature of the duel and with methods used to restrict its use and to gradually capture the right of violence to the emerging state.

It is interesting that within the three texts reviewed here, that we see so clearly the threads of continuity which allow and perhaps compel the duel to survive this march of Roman law, seeking refuge first in the customary law of arms and later within the extra-legal code of honor,

[65] This is a clear following of Legnano's definition dividing the kinds of duel into a trinity. *An edition with introduction of John Blount's English Translation of Nicholas Upton's De Studio Militari*, edited by C.G. Walker, unpublished Ph.d dissertation, 1998, p. 62.
[66] Ibid., pp. 64-6.

yet another form of customary practice which gradually arose to address the lack of legal tools available for perceived damage to renown, or in the terms of the 16th and 17th centuries, honor. Giovanni da Legnano clearly identified this kind of duel in 1360, dismissing it as "seeking glory." In Legnano's analysis, the two kinds of duel were closely related, although different. I would argue that they were related because the related mechanisms of fama and renown, interwoven with the idea of the feat of arms, were also related and served valuable functions within pre-modern societies.

By the early 16th century, the transformation of law in Europe was complete, or nearly so, despite resistance.[67] Following the attempted establishment of Roman Law as the official law throughout the Holy Roman Empire by Charles V by 1520, the recourse to a judicial duel was all but removed from legal proceedings, replaced by the Grand Assize and the rational—if state-serving—standardized justice administered by professional justices and lawyers.

Judicial Duels & Duels of Chivalry (Emprises)

In this sense, the judicial duel must be viewed, I think, as taking its place on the spectrum of those feats of arms we discussed earlier. It rested, certainly, at a point very close to war, indeed it was sometimes known as "wager" or "trial" by battle. Commensurately, it would have won for or lost for the participants immense amounts of *fama* or *infama*, based on the outcome. It was perhaps the ultimate arbiter of name and worth in a day where violence was much more common than today. Like war, the degree of risk seems to have been both a deterrent and the most powerful appeal available. In a real sense, it was a feat of arms, albeit one available as a recourse even to those outside the military class. For those who could not participate on their

[67] Strauss, Gerald. *Law, Resistance and the State: Opposition to Roman Law in Reformation Germany*.

own—such as the old, or women—a family member could substitute or a champion could be hired.

Alongside of these judicial duels were the great martial contests between knights, *emprises*, as I like to call them, in order to distinguish them from other, more pedestrian feats conducted *à plaisance*. These deeds of arms were often national in character, and involved considerable risks to the combatants, as they employed sharp weapons and could result in severe injury, or even death. These were combats *à outrance*, *a oltranza*, in the Italian, which were so common during the 14th and 15th centuries. They were expressions both of the growing nationalism which came out of the Hundred Year's War, of the continual desire by individual knights to test themselves one against the other (as the joust had done for three centuries previously) and as entertainment. I believe they also served as restorative spectacles reinforcing the chivalric ideas in the face of determined bourgeois and state opposition, but that is perhaps another topic.

These duels were held all over the marches, between English and Scottish knights, for example, or between Burgundian and German knights, or of course, between the French and the English. In form, they are strikingly close to the judicial duel—the armaments are the same, the armour is the same, and the invocations are even similar. Indeed, I argue that the chivalric duel of the period is nothing more than a voluntary judicial duel. Needless to say, there was considerable controversy on this form of "extreme" sport, just as the wild and rough tournaments of the 12th and 13th century had come under sharp critique by the church and some princes. But they were customary practice amongst the chivalric classes and were regulated under the customary laws of war. They were an iteration of Legnano's second type—"seeking glory,"—although one has the sense perhaps of clerical and civil disapproval in Legnano's text, disdain for

the importance of renown and personal name in medieval society. Bonet and Upton seem to have understood this better, for they recognize customary practice—holding out in the "final redoubt" of Lombard law—until finally banished in the early 16th century.

Moving outside the law:
From judicial duel to the duel of honor

Roman law, however, as I mentioned earlier, did not take into account injury to renown or to honor, or to prestige. With no such mechanism, I argue, the local communities—not yet transformed through tax policy and urbanization into arms of a state—still had to contend with issues of import to the military and gentry classes.

At the same time, a rising bourgeoisie adopted the trappings of nobility, including sumptuary laws designed to enable them to wear the clothes of the nobility, their acquisition of arms by patent—heraldic devices—and their acquisition of land. Along with these acquisitions came some of the social structures of the gentry, including a hint of the military responsibilities which clung to the class as an important pieces of heritage and of social and political prestige.

Even as the knight was evolving into the professional officer, the chivalric ideals morphed into the ideas of the officer and a gentleman, a military mold more amenable to service by the "new nobility" of the nouveau-riche and, eventually, amenable to entry by those demonstrating the keystone military virtues, prowess (which became excellence), courage, and loyalty.

Within this military and quasi-military community, situated within the larger community of a growing state, pressures of loss of reputation—known by the 16th century as *honor*—lost their outlets. Chivalric duels were no longer practiced, largely because the knightly class was in decline and the chivalric duel was a warrior's prerogative, much as private war had been a feudal

noble's prerogative. There was no official, legal outlet for redress in matters concerning the loss of honor and reputation, still very much in the minds of the gentry both new and old.

I argue that the duel therefore persisted, but under direct assault by Roman law, it retreated into a legal redoubt—the customary law of military practice. This law had never quite been conquered by civil or criminal law codes of Rome, despite numerous attempts. Courts of Chivalry, established during the 14th century, enabled the duel to survive as the most important appeal in cases where treason was charged, and the military courts (the High Court of Chivalry in England, and the Constables Court in France) continued to regulate disputes concerning matters of disputes, which increasingly became associated not with charges of treason, but of honor. But (and here is where my research now stands), by the late 17th century even matters of honor were largely banished from the royal courts of the Constable and Marshal, and the mechanism of the duel had no legal place to go—therefore, it retreated still further, until it was fully outside the law.

We have then at our terminus the duel of honor, a customary procedure which formed gradually in response to the stimuli of a need for redress in matters of personal name and honor in a society where those ideas still had meaning. Dueling survived throughout the 19th century, regulated by an intricate code of conduct epitomized in the Irish Code Duello of 1777, until it long last that too was banished under the march of secular law. The duel, I believe, became modern sport, first through the combat arts of fencing and pugilism (boxing), and later through game and team sports. It may survive today on the road, where we compete to get ahead of that car just ahead, salving our wounded spirit on the faceless.

* * *

Let's return now to the puzzling scenes in Paulus Kal. The domestic dispute represents a local custom, albeit a very bizarre one, for handling domestic disputes in cases where proof was hard to obtain. In most places in Europe, women were forbidden to participate in trials by combat, but a champion is perhaps not perfectly appropriate in cases where her husband would be fighting against him (what if her champion were a lover, for example?). I do not yet have the details of Bavarian customs in dealing with particular disputes—indeed the records may well not exist—but there are more similar accounts in other fighting treatises, especially those of Hans Talhoffer, whose work shows even more detail and which is contemporary or perhaps a few years earlier.

In treatises following the long Liechtenauer tradition, in the 16th century, scenes such as this abruptly vanish. I posit that the reason for this is that they represent customary practice, practice which is banished with the establishment of Roman law in the region. We don't find them any longer because they are illegal.

But why is it included in a book of chivalric technique? I believe this demonstrates my thesis that trial by combat was considered by our medieval predecessors—at least those in the German states—as being closely related to other feats of arms. And while undertaken by different classes of society, they were still members of the society whose sense of community was rooted in mechanisms of *fama* and *infama*, key mechanisms which underlie all small societies.

Therefore, it makes a certain amount of sense, which is at first blush perhaps hard to see, why places like these would be included in a work of chivalric technique. What we have here is

an interesting piece of evidence from which we can explore the great conflict of medieval Europe which we have investigated in the course of this class—the struggle between the localities and the forces of centralization both secular and ecclesiastical.

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